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- (1) This was not a plain and obvious case that summary process can be resorted to in order to strike out plaintiff's summons and statement of claim as there were many issues which should be resolved in a trial proper and there was absolutely a need for minute examination of all relevant

documents filed by the parties. The trial of this case had started and it ought to continue so that all evidential aspects as raised in the respective affidavits and submissions by both parties could be ventilated and resolved in the trial. The defendant's application must be refused as it could not be maintained especially after the trial had been set down for trial and all the most after the trial had commenced (see paras 12–13).

- (2) The fact that the plaintiff was a sole establishment with its license being issued to the Sheikh was a known fact to all parties and it did not prejudice the defendant which had also made the necessary searches and had known of such fact. The plaintiff's claim was not obviously unsustainable or that there was no reasonable cause of action (see para 12).

[Bahasa Malaysia summary]

Dalam permohonan ini, defendan memohon untuk membatalkan writ saman plaintiff dan penyata tuntutan. Ia didakwa bahawa ia tidak mengandungi kausa tindakan, bersifat skandal, remeh atau menyusahkan, mungkin prejudis, memalukan atau melewati perbicaraan adil tindakan atau penyalahgunaan proses mahkamah. Defendan berhujah bahawa plaintiff tidak mempunyai locus standi untuk menyaman defendan seperti pemilik tunggal mesti menyaman di atas namanya sendiri dan bukan nama niaganya yang mana adalah pembelaan utaman di dalam perbicaraan. Ia selanjutnya dihujahkan plaintiff adalah dilesenkan berasingan daripada 'Petroserv General Trading Establishment' ('cawangan') yang mana adalah cawangan yang plaintiff berniaga dengan defendan menggunakan nama 'Petroserv-J.F.K. Division' untuk kemudahan. Memandangkan cawangan tersebut hanya wujud pada tahun 1996 apabila plaintiff memulakan hubungan perniagaan mereka dengan defendan, defendan berhujah bahawa tidak terdapat hubungan di antara cawangan dan defendan. Mengikut defendan, John Frederick Keen, pengurus plaintiff dan satu-satunya saksi di dalam perbicaraan, telah berniaga dengan defendan pada 1994 sedangkan pekerjaannya dengan plaintiff hanya bermula pada 1997. Oleh itu, ia didakwa bahawa John Frederick Keen mempunyai pengaturan tak sah dengan Sheikh menggunakan Sheikh sebagai wakil, bertentangan undang-undang 'Anti-Fronting' Dubai. Akhir sekali, defendan berhujah bahawa plaintiff telah menipu defendan untuk mempercayai kewujudan syarikat yang bernama 'Petroserv Limited' di Doha, Qatar tetapi defendan tidak pernah berniaga dengan Sheikh kecuali dengan John Frederick Keen di bawah 'Petroserv-J.F.K. Division'.

Diputuskan, menolak permohonan dengan kos:

- (1) Ini bukan kes yang jelas bahawa proses ringkas boleh dirujuk untuk membatalkan saman dan penyata tuntutan plaintiff memandangkan terdapat banyak isu yang patut diselesaikan di dalam perbicaraan betul dan betul-betul terdapat keperluan untuk pemeriksaan teliti kesemua

- A** dokumen yang relevan yang difailkan oleh pihak-pihak. Perbicaraan kes ini bermula dan patut bersambung supaya kesemua aspek keterangan seperti yang dibangkitkan di dalam affidavit masing-masing dan hujahan-hujahan oleh kedua-dua pihak boleh diutarakan dan diselesaikan di dalam perbicaraan. Permohonan defendan mesti ditolak
- B** memandangkan ia tidak dapat dikekalkan terutamanya selepas perbicaraan telah ditetapkan untuk perbicaraan dan kesemua selepas perbicaraan telah bermula (lihat perenggan 12–13).
- C** (2) Fakta bahawa plaintif adalah penubuhan tunggal dengan lesennya dikeluarkan kepada Sheikh adalah fakta yang diketahui oleh kesemua pihak-pihak dan ia tidak prejudis defendan yang mana juga membuat pencarian perlu dan mengetahui fakta sedemikian. Tuntutan plaintif jelas tidak dapat dikekalkan atau tiada kausa tindakan yang munasabah (lihat perenggan 12).]
- D** **Notes**
For cases on application to strike out action, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7992–8012.
- E** **Cases referred to**
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman & Ors [1987] 2 MLJ 633; [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 (refd)
- F** *Boo Are Ngor (p) v Chua Mee Liang (p) (Syed as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145; [2009] 6 CLJ 617, FC (folld)
Lee Nyan Choi v Voon Noon [1979] 2 MLJ 28; [1978] 1 LNS 94, FC (refd)
Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105, FC (refd)
- G** *Siang Yam Beng v Marushin Canneries (M) Sdn Bhd* [1995] 4 MLJ 691, HC (refd)
Tengku Ali Ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83; [1994] 2 CLJ 685, HC (refd)
Thiruchelvasegaram Manickavasegar v Mahadevi Nadchatiram [2001] 3 CLJ 743, HC (refd)
- H** *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, PC (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] CLJ (Rep) 428, FC (refd)
- I** **Legislation referred to**
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d), O 33 rr 2, 3
Simon Hue Fook Chuan (V Vanaranei a/p Vadiveloo with him) (Simon Hue & Associates) for the plaintiff.

Karen Lim (Shareen Abd Manan with her) (Presgrave & Matthews) for the defendant. A

Chew Soo Ho JC:

DECISION (ENC — 21) B

ENCLOSURE 21

[1] This is an application dated 7 March 2006 by the defendant supported by an affidavit to strike out the plaintiff's writ of summons and statement of claim dated 13 October 2006 with costs pursuant to O 18 r 19(1)(a) and/or (b) and/or (c) and/or (d) of the Rules of the High Court 1980 ('RHC') as they allegedly disclose no reasonable cause of action, are scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the court. C D

[2] This application was filed after the trial had commenced and the sole witness of the plaintiff had almost completed his examination-in-chief with the introduction of his witness statement which had been admitted and marked as exh P1. It was at the stage of adducing and marking documents when the trial was adjourned for continuation on account of another interlocutory application for amendment that this encl 21 was filed by the defendant as a separate application to attempt to strike out the plaintiff's action. E

[3] The main grounds for this application are: F

- (a) the plaintiff does not have the locus standi to sue the defendant as a sole proprietor must sue in his own name and not in his trade name which is the principal defence in the trial; G
- (b) the plaintiff is separately licensed from 'Petroserv General Trading Establishment (Branch)' which was the branch that the plaintiff had traded with the defendant using the name 'Petroserv-JFK Division' for convenience. The defendant contended that from the legal advice by the defendant's solicitors from Dubai, the branch is not the registered branch of the plaintiff and it had also ceased to exist upon its commercial licence having expired on 25 October 2011. As the branch existed only in 1996 when the plaintiff had commenced their business relationship with the defendant, there is no nexus between the branch and the defendant; H
- (c) John Frederick Keen, the plaintiff's manager and sole witness in the trial, has traded with the defendant in 1994 whereas his employment with the plaintiff only commenced in 1997. Hence the defendant contended that John Frederick Keen was trading with the defendant in his personal capacity under the trading name of Petroserv-JFK Division. It was alleged I

A that John Frederick Keen had an illegal arrangement with the Sheikh using the later as a front thereby contravening the Anti-Fronting Law of Dubai; and

B (d) the plaintiff had misled the defendant into believing the existence of a company called 'Petroserv Limited' in Doha, Qatar but the defendant had never traded with the Sheikh except with John Frederick Keen under 'Petroserv-JFK Division'.

C EVALUATION AND FINDINGS

D [4] The law pertaining to striking out of a party's pleading under O 18 r 19(1) of the RHC is well settled that it is only in a plain and obvious case or that a claim is on the face of it obviously unsustainable that this summary process is to be sought. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, His Lordship Mohamed Dzaiddin SCJ (as he then was) in delivering the judgment of the Federal Court has held, *inter alia*, at p 43 the clear principles of the law in this respect as follows:

E The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule ..., and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of its 'obviously unsustainable' ... It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether

F there is a cause of action or a defence ... The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in *pari material* with our O 33 r 2 of the RHC) ... The court must be satisfied that

G there is no reasonable cause of action or that the claims are frivolous or vexatious or that defences raised are not arguable.

H [5] Another clear principle of law relating to O 18 r 19(1) of the RHC is that the application must be made with promptitude and as a rule before the close of the pleadings. However, the court may allow an application even after the pleadings are closed. But once the case has been set down for trial, such an application must be refused; per His Lordship Zulkefli Makinudin FCJ (now CJ Malaya) in *Boo Are Ngor (p) v Chua Mee Liang (p) (Syed as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145 at p 151; [2009] 6 CLJ 617 at p 624 (FC).

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[6] Learned counsel for the plaintiff strenuously objected to such an application by the defendant at this late stage when not only had the suit been set for trial but the trial had already commenced with the examination-in-chief

evidence of the sole witness for the plaintiff almost completing. He cited the words of His Lordship Abdul Malik Ishak J (now JCA) in *Thiruchelvasegaram Manickavasegar v Mahadevi Nadchatiram* [2001] 3 CLJ 743 at p 765 that once 'the action had been entered for trial and it was too late in the day for the defendant to strike out the plaintiff's claim'. Learned counsel for the defendant submitted vide written submission that this encl 21 was filed because of an oral application by the plaintiff to amend the title of the writ by adding the name of Sheikh Khaled Jassem M Al-Thani trading as Petroserv General Trading Establishment and to delete the words 'a company incorporated in Doha, Qatar' in para 1 of the statement of claim. Secondly, the defendant alleged that it was for the very first time that the plaintiff's witness John Frederick Keen had mentioned in his witness statement (exh P1) tendered in court on 14 February 2012 that Sheikh Khaled Jassem M Al-Thani ('the Sheikh') is actually the sole proprietor of the plaintiff. It was contended thirdly that without any amendments, the plaintiff's action must be struck out.

[7] I am indeed truly astonished as to the grounds raised by the defendant to file this encl 21. As distinct for an application under O 18 r 19(1) of the RHC, an amendment to the pleading of a party can be made at any stage of the proceedings subject to the guiding principles as laid down in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ (Rep) 428 (FC). Such an oral application amendment at the trial stage does not mean and cannot be construed that the pleadings are not closed when they had long been with the trial having been set down and in fact proceeded on. As categorically expressed by His Lordship Zulkefli Makinudin FCJ (as His Lordship then was) in *Boo Are Ngor v Chua Mee Liang* that: 'But such an application must be refused after the action has been set down for trial', encl 21 which is filed after the trial had in fact commenced with the sole witness for the plaintiff almost completing his evidence in examination-in-chief, must certainly be refused as a matter of law as this court is bound by the Federal Court decision in *Boo Are Ngor v Chua Mee Liang* which had also cited the case of *Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman & Ors* [1987] 2 MLJ 633; [1987] 1 CLJ 572; [1987] CLJ (Rep) 472; see also *Tengku Ali Ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83; [1994] 2 CLJ 685; *Siang Yam Beng v Marushin Canneries (M) Sdn Bhd* [1995] 4 MLJ 691. Therefore, this application made after six years and after the trial has commenced cannot be maintained and must be refused.

[8] On the second ground that it was only from John Frederick Keen's witness statement that it came to light that the Sheikh was and is the actual sole proprietor of the plaintiff, I am equally surprised that such an excuse is being relied on by the defendant as the documentary evidence comprising of the Commercial Licences No 222335 and No 243959 issued to Petroserv General

- A** Trading Establishment and Petroserv General Trading Est (Branch) respectively are so obvious that they are sole establishment under the licence holder namely the Sheikh whereas Petroserv — JFK Division was not a legal entity but was merely a name given to the aforesaid licensed branch as submitted by the plaintiff. From exh 'JFK3' annexed to the plaintiff's affidavit
- B** in reply sworn by John Frederick Keen, it is abundantly clear also that at or around 30 June 2010, the defendant had been duly informed by Messrs Horwath Mak, auditors and business advisors from Dubai, UAE that Petroserv General Trading Est Dubai, UAE is a legal entity and a valid licence holder as well as a sole establishment from its search while Petroserv JFK Division or
- C** Petroserv JFK. Division is not a legal entity and not a valid licence holder. The Sheikh was and is not a fictitious person as his passport was exhibited as exh 'JFK2' in the same affidavit of the plaintiff. From exh 'JFK8', the various documents showed that John Frederick Keen was sales and/or administration manager under the sponsorship of Petroserv General Trading Establishment;
- D** those documents are from Department of Health and Medical Services, Dubai, Ministry of Health UAE, Dubai Labour Bureau or Dubai Ministry of Labour Bureau. Exhibit 'JFK10' further shows the advertisement advertised in the UAE Commercial and Industrial Directory in the name of Petroserv General Trading Est JFK Division as an indenting agent for the defendant's MDF. The
- E** plaintiff submitted that the defendant knew all those facts and had never objected. From the superficial reading of the relevant documents exhibited by the plaintiff, the commercial licence holder in the name of the Sheikh and that the Establishment was and is a legal entity while the branch was and is a licensed branch of the Establishment as well as the fact that it was a sole
- F** establishment are known facts to the defendant. It is preposterous for the defendant to contend six years later at the trial stage that it only came to light when John Frederick Keen said in his witness statement that the plaintiff is a sole proprietorship or sole establishment when all available documents to the defendant before the trial had commenced indicated that the defendant had
- G** the full knowledge or ought to know of such facts or that they deliberately chose to shut their eyes on those facts which are clearly reflected in the same documents. In any event, there is a need for minute examination of all these documents and the facts of the case as contended by the parties which rendered the issues triable and which can only be resolved in the trial proper. With the
- H** need to exercise minute examination of the documents and facts of the case, an application to strike out is certainly not applicable; see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd*. On the documentary evidence and the facts of this case, I do not find and am certainly not satisfied that it is a plain and obvious case for recourse to this summary process under O
- I** 18 r 19(1) of the RHC.

[9] The defendant had contended that without any amendments, the plaintiff's action must be struck out. That being their argument, why was such an application not taken up before the close of the pleadings. Even after the

close of the pleadings and after the defendant had made the search and secured all relevant documents, why did they not apply to strike out the plaintiff's pleadings on ground of non-capacity or locus standi? Why must they wait for six years and until the trial had commenced? I find such delay is not excusable. Enclosure 21 is so filed purely to counter or to frustrate the oral application by the plaintiff to amend the title and para 1 of the statement of claim to add in the name of the Sheikh trading as Petroserv Genereal Trading Establishment as it was not an incorporation from the commercial licences granted. This fact is no surprise to the defendant as they had inquired or made searches and were appraised of such fact. There is thus no question of the defendant being misled by the plaintiff when documentary evidence showed unequivocally that an incorporation was an error which could be cured by an amendment. Such application by the defendant in the circumstances is mala fide and an abuse of the process of the court.

[10] The plaintiff's statement of claim basically claimed for wrongful termination of the their agency for the defendant in the Middle East for the defendant's products which termination was not disputed but the damages claimed. The plaintiff also claimed for the outstanding commissions which were due to the plaintiff but were not paid by the defendant which the defendant contended that some items were due to Petroserv — JFK Division but not the plaintiff or some orders had been cancelled. Prima facie, I do not find such claim of the plaintiff 'obviously unsustainable' but that they are triable issues to go to trial. In *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105, the Federal Court has held, inter alia, that as long as the statement of claim disclosed some ground of action and that the mere fact that the plaintiff was unlikely to succeed at the trial of the action was not a ground for striking out. Bearing in mind the words of His Lordship Lee Han Hoe CJ (Borneo) in *Lee Ngan Choi v Voon Noon* [1979] 2 MLJ 28 at p 29; [1978] 1 LNS 94 that:

The power to dismiss an action summarily without permitting a party to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to on plain and obvious cases.

[11] I do not find that this is a proper case to resort to such drastic measure and draconian method to strike out an action summarily; see also *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 (PC).

CONCLUSION

[12] Having perused the affidavits filed by both parties in relation to this application and having heard all the submissions, I hold that this is not a plain and obvious case that summary process can be resorted to to strike out the

A plaintiff's summons and statement of claim as they are many issues which should be resolved in a trial proper and there is absolutely a need for minute examination of all relevant documents filed by the parties. I also find that the fact that the plaintiff is a sole establishment with its licence being issued to the Sheikh is a known fact to all parties and it does not prejudice the defendant

B which had also made the necessary searches and had known of such fact. The plaintiff's claim is not obviously unsustainable or that there is no reasonable cause of action.

C [13] The trial of this case has started and it ought to continue so that all evidential aspects as raised in the respective affidavits and submissions by both parties can be ventilated and resolved in the trial.

D [14] For the reasons as deliberated above, I find that the defendant's application herein must be refused as it cannot be maintained especially after the trial has been set down for trial and all the most after the trial had commenced (*Boo Are Ngor v Chua Mee Liang* followed). Consequently, the application by the defendant vide encl 21 is dismissed with costs.

E *Application dismissed with costs.*

Reported by Afiq Mohamad Noor

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